BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLY M. HIGGINS		
Claimant	)	
VS.	)	
	)	
ARMED FORCES BANK NA	)	
Respondent	)	Docket No. 1,057,856
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 29, 2012, Award entered by Administrative Law Judge (ALJ) William G. Belden. The Board heard oral argument on April 10, 2013. E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of Board Member John F. Carpinelli.

APPEARANCES

James E. Martin of Overland Park, Kansas, appeared for claimant. Katharine M. Collins of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated that if the Board finds that claimant sustained a personal injury by accident arising out of and in the course of her employment: (1) neither party would contest ALJ Belden's award of temporary total disability benefits of 56.29 weeks from December 19 to 31, 2010, and January 2, 2011, to January 17, 2012, at the rate of $371.90 per week for a total of $20,934.25; (2) claimant is entitled to future

and unauthorized medical benefits; and (3) claimant has a wage loss of 100% and a task loss of 0% for a work disability of 50%.[1]

ISSUES

This is a claim for a December 19, 2010, accident in which claimant slipped on ice in a parking lot at her place of employment and sustained whole body injuries. In the November 29, 2012, Award, ALJ Belden determined claimant's accidental injuries arose out of and in the course of her employment with respondent. The ALJ awarded claimant 56.29 weeks of temporary total disability benefits and permanent partial disability benefits based upon a 50% work disability. The ALJ also awarded claimant authorized, unauthorized and future medical benefits.

Respondent contends claimant did not meet her burden of proving her accident arose out of and in the course of her employment as the preponderance of the credible evidence indicates a lack of control by respondent over the parking lot where claimant slipped. Respondent asserts the landlord, not respondent, exercised control of the parking lot. Respondent argues claimant's accident occurred while she was on her way to work. Respondent maintains it did not control the parking lot and, therefore, the premises exception to K.S.A. 2010 Supp. 44-508(f) does not apply and compensation should be denied.

Claimant contends this claim occurred within the provisions of the Kansas Workers Compensation Act and is compensable as arising out of and in the course of her employment with respondent. Claimant requests the Board affirm the ALJ's Award.

The sole issue before the Board on this appeal is: Did claimant's personal injury by accident arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant was employed as a customer service representative for respondent at its call center, which is open 24 hours a day, seven days a week. Claimant testified there are 100 to 150 employees on her shift. The call center is located in a building that contains several tenants; however, claimant did not know who those tenants were. During regular business hours the building is unlocked. If the building is locked, claimant uses a key card

[1] The parties previously stipulated that claimant had a 5% whole body functional impairment and that if claimant's injuries were compensable, that claimant's medical bills set forth in Stipulation 11 of ALJ Belden's Award were reasonable and necessary.

issued to her by respondent to access the left entrance on the south side of the building, which claimant described as the main entrance. She then uses the key card to access an interior door to respondent's call center. Claimant did not know if the employees of the other tenants had key cards to access the building. Claimant testified there is a second entrance on the south side of the building, to which only respondent's supervisors have access.

Claimant testified that she was told to park only in the parking lots that were west and south of the building. She was sent emails from the call center director, Patty L. Tate, that vehicles parked anywhere but in the south and west parking lots would be towed. However, claimant placed no emails into the record. Claimant did not recall whether there were signs in the west and south parking lots indicating the parking lots were for respondent's employees only. Claimant did not know if anyone other than respondent's employees were permitted to park in the south and west parking lots. Claimant did not have an assigned parking spot and tried to park as close to the building as possible. She would always park in the south parking lot and on different days, would park in different spots.

Claimant did not know if respondent was renting the building where she worked or was buying it. She also did not know who was responsible for maintaining the parking lot. Claimant testified there were businesses on the north and east side of the building. There were entrances and parking lots on the north and east side of the building.

On December 19, 2010, claimant pulled her vehicle into the south parking lot, got out of the vehicle and slipped on ice. She did not hit the ground. Claimant proceeded into work using her key card. It was not until one and one-half hours later that claimant began to feel stiff and sore and developed a migraine headache. Claimant reported the incident to her supervisor and was sent to see Dr. Lawhead the same day.

Ms. Tate testified the building where claimant worked has four floors and approximately seven tenants. Ms. Tate indicated there is an entrance and an exit on the south side of the building. The entrance can be used by anyone, but is locked from 6 p.m. to 6 a.m. Monday through Friday and all day on Saturdays and Sundays. Only supervisors of respondent have a key to go in the building through the exit door. However, tenants in the building may exit through the exit door. There is also a smoking area covered by a canopy that is accessed by exiting one of the doors to the building.

The main entrance to the building, which anyone can use, is a second-floor entrance on the west side. The west entrance is also locked from 6 p.m. to 6 a.m. Monday through Friday and all day on Saturdays and Sundays. During other times, employees of tenants can access the building using a key card. Employees could use either the south or west entrance to enter the building. Respondent's employees were not instructed to use a particular entrance to leave the building.

Ms. Tate indicated the building is owned by Greenamyre Reynolds, not respondent. She testified that Greenamyre Reynolds also owns the south and west parking lots. According to Ms. Tate, respondent does not have control over who can park where in the parking lots, who can use the parking lots or how long someone parks in the parking lots. Nor does respondent take care of snow removal, fill potholes or otherwise maintain the parking lots. Greenamyre Reynolds contracts with others and also uses its own employees to maintain the parking lots.

Ms. Tate testified that respondent and other tenants do not have designated spots within the parking lots. Ms. Tate averred that respondent had never instructed employees where to park. She denied that respondent's employees were told to park only in the west or south parking lots. Respondent's employees could park in other areas, such as the northeast side of the building, but those are the furthest from the south entrance to the building. The only time employees of respondent would park northeast of the building is if the south and west lots were full.

At Ms. Tate's deposition, copies of three emails were introduced. The first was from Jeremy Greenamyre to Ms. Tate for respondent's employees. It indicated that automobiles parked in striped, no-parking zones would be towed away. A second email from Ms. Tate to all employees stated they should not park in visitor parking, the loading zone or anywhere not striped for parking. A third email from Jeremy Greenamyre to Ms. Tate requested that respondent's employees not park in the south lot during snowstorms until it was plowed.

Ms. Tate indicated that she had access to respondent's lease with Greenamyre Reynolds, but did not bring it to the deposition. She did not know if the lease provided that respondent had a certain number of parking spaces for its use.

Amy Enloe, a customer service representative for respondent who worked in respondent's call center, testified that she was directed in her training class to park in the south, and if it was full, in the west parking lot. She also indicated that respondent's handbook gave the same instructions. A copy of respondent's handbook was not placed into evidence. Ms. Enloe testified that there were also emails from Ms. Tate concerning parking. On cross-examination, Ms. Enloe confirmed there were no signs in the parking lot that said Armed Forces Bank parking. Nor were employees required to have a sticker on their vehicles indicating they were respondent's employees. Ms. Enloe indicated, except for weekends, there were not enough spaces in the south parking lot for all of respondent's employees to park. She did not know if respondent had any control over who parked in the south parking lot.

Ms. Enloe indicated that to enter the building on weekends, only the south café entrance could be accessed using a key card issued by respondent. She testified that on weekends, the key card did not work on the west entrance.

ALJ Belden found that claimant met with personal injury by accident arising out of and in the course of her employment with respondent. ALJ Belden stated:

> Under the Act in effect at the time of the injury, it was the intent of the Legislature to liberally construe the Act for the purpose of bringing employers and employees within its protections. *See* K.S.A. 44-508(g). As a general rule, "arising out of and in the course of employment" shall not be construed to include injuries occurring while the employee is on the way to assume the duties of employment. An employee shall not be deemed, however, to be on the way to assume the duties of employment when the employee is on the employer's premises or on the only available route that involves a special risk or hazard not used by the public except in dealings with the employer. *See* K.S.A. 44-508(f). The employer must exercise control over an area for it to be part of the premises for the purposes of the "premises" exception. *See Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 41 (1994). Actual ownership of parking lot or responsibility for maintenance is not required to establish control. Once control is established, it is unnecessary to consider whether there is a greater risk than that faced by the general public. *See Rinke v. Bank of America*, 282 Kan. 746, 756, 762-63 (2006). In *Thompson*, benefits were denied because the employer paid the employee's parking at a garage owned by a different entity than the one who owned the office building where employee worked, and employer did not direct employee where to park. 256 Kan. at 44. In *Rinke*, the Court found the accident took place on employer's premises, a leased parking lot, where the parking lot was adjacent to the office building, the employer leased a substantial portion of office space and parking spaces from the same entity, the employer was allocated a certain portion of the parking lot by the landlord, the employer requested the employee to park in the allocated parking spaces and the injury occurred in the area of the lot leased by employer. 282 Kan. at 762-63. In reconciling these cases, the Appeals Board found particular import where the same entity owns the parking lot and the adjacent structure. *See Pleasant v. Moreno Family Dentistry*, Docket No. 1,058,353, p.3, 2012 WL 1652977 (W.C.A.B. Apr. 6, 2012).
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> This claim is distinguishable from *Thompson* and very similar to *Rinke*. Here, the same legal entity owns the office building and the adjacent parking lot, and Respondent leased possession and use of both properties by virtue of its leasehold relationship with Greenamyre. Respondent did more than pay for parking. Respondent used a significant portion of the parking lots compared to the other tenants, and the South and West lots were specifically intended for the use of Respondent's employees. Respondent instructed its employees where to park. Although Respondent argues it only issued parking instructions at the request of Greenamyre, this is because Respondent's employees would be expected to heed the instruction of their employer. Finally, the accident clearly occurred in the South lot used by Respondent. Based on the indicia of control, the Court finds and concludes the accident occurred on Respondent's premises, and the exception to the "going and coming rule" applies. Claimant's accident[al] injuries arose out of

and in the course of her employment with Respondent and she is entitled to an award of compensation.[2]

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(a) states:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his or her right to an award for compensation by proving all the various conditions on which his or her right to a recovery depends. This must be established by a preponderance of the credible evidence.[3]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which

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[2] ALJ Award at 6-7.

[3] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[4]

K.S.A. 2010 Supp. 44-508(f), in pertinent part states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

The Board differs with ALJ Belden and concludes the facts of this claim are more similar to those of *Thompson*,[5] rather than *Rinke*.[6] In *Thompson*, neither the parking garage where the injured employee parked nor the building where she worked were owned, controlled or maintained by the employer. The injured employee had two routes from the parking garage to the building where she worked. The employee did not argue that her injuries were caused by her employer's negligence or that the route she took to her employer's office involved any special risk or hazard. In *Thompson*, the Kansas Supreme Court concluded the injured employee had not yet arrived at her employer's premises and stated:

> Linda was not on her employer's premises at the time of the injury, nor was she yet performing any duties associated with her employment. She was merely on her way to work, an activity which the Kansas Legislature has made not compensable. Any risk of injury in the office building was no greater than that to which any member of the general public using the office building was subjected. Linda was not on her employer's premises at the time of her injury, and therefore the injury is not compensable.[7]

The facts of *Rinke* are distinguishable from the facts of this claim. In *Rinke*, the employer leased 94% of a building and 737 of 757 parking spaces from Argora Properties,

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[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[5] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[6] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

[7] *Thompson*, 256 Kan. at 46-47.

L.P. Wesley Occupational Services leased the remainder of the building and the other 20 parking spaces. According to the lease agreement rider, the 737 reserved spaces represented by the "reserved parking permits" would at all times be located within an area of the lot designated for use solely by the Bank (Rinke's employer). The lease also provided the employer could install and maintain a drive-up ATM facility on the eastern edge of the parking lot. Argora was responsible for maintenance, lighting and security of the lot. The Bank possessed the right to have Argora, upon request, promptly tow any unauthorized automobiles parked in any reserved space or on any surface parking area. The injured employee fell as she was leaving work. According to the injured employee, employees had to go through the parking lot to enter and exit the building. As she approached her vehicle parked in the lot four or five stalls from the walkway, the injured worker slipped on sand that was placed to prevent people from slipping on an ice patch.

In *Rinke*, the Kansas Supreme Court found that the employer's control of the parking lot's 737 parking spaces was critical. The Court stated:

> Accordingly, under our facts, we find some measure of Bank control inherent in its lease of 737 of 757 spaces in a parking lot for its employees working in an adjacent "secured" 150,000 square foot building which is being rented from the same landlord in the same lease. We see little practical difference between these circumstances and those where an employer owns the building and its adjoining employee parking lot. . . .
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> . . . .
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> The instant case provides even stronger facts supporting this rationale. First, the Bank has expressly leased up to 97% of the lot; the balance, 20 spaces or 3%, is specifically reserved for the only other tenant in the office building adjoining the lot. Accordingly, unlike *Livingstone* [*v. Abraham & Straus, Inc*., 111 N.J. 89, 543 A.2d 45 (1988)], there is no need to unilaterally "appropriate" any spaces from a common lot for Bank employees' use. Indeed, the Bank has the express authority under the lease to require landlord Argora to tow unauthorized vehicles from Bank spaces.
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> Second, the Bank directs its employees to not park in Wesley's 20 reserved spaces. The lease agreement supports this employer directive. Additionally, Bank employees' vehicles which are in violation are ticketed. Bank employees are requested to park in other spaces.
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> Third, the Bank has the right under the lease agreement to install and maintain an ATM facility, at its own expense, in an area along the lot's edge. While this entitlement does not affect the control of parking, it does indicate some added Bank control of the parking lot.[8]

[8] *Rinke*, 282 Kan. at 757-759.

In the present claim, members of the public could park in the south parking lot, while in *Rinke*, only the Bank's employees were allowed to park in the parking lot leased by the Bank. Here, claimant could park anywhere she wanted, so long as it was not in a no-parking or loading zone. Claimant parked in the south parking lot because it was closest to the entrance she normally used, not because respondent required her to do so. There were no designated parking places for employees. Respondent did not own, control or maintain the parking lots. Respondent was not assigned a certain number of parking spaces. Simply put, respondent had little, if any, control over the parking lots unlike the employer did in *Rinke*. Therefore, the Board finds that claimant's accident did not arise out of her employment with respondent.

None of the exceptions set forth in K.S.A. 2010 Supp. 44-508(f) apply. Claimant obviously was not a provider of emergency services responding to an emergency. Ms. Tate testified there were two entrances that claimant could use to enter the building. Even if claimant and Ms. Enloe's assertion that only the south entrance could be accessed by respondent's employees on the weekends is correct, there was insufficient evidence presented that the route involved a special risk or hazard or that the proximate cause of claimant's injuries was respondent's negligence.

CONCLUSION

Claimant's personal injury by accident did not arise out of and in the course of her employment with respondent as claimant's accident occurred on her way to her employment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[9] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the November 29, 2012, Award entered by ALJ Belden.

IT IS SO ORDERED.

[9] K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

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